1997

Debra Ekins, aka Debra A. Ekins v. Wallace Associates Business Properties Group Inc., a Utah corporation: Reply Brief of Appellant

Utah Court of Appeals

John E. S. Robson; John D. Dunn; Fabian & Clendenin; Attorneys for Wallace Associates Business Properties Group.
James C. Swindler; Johnson & Hatch; Attorneys for Debra Ekins.

UTAH COURT OF APPEALS

DEBRA EKINS, aka Debra A. Ekins, Plaintiff and Appellee, vs. WALLACE ASSOCIATES BUSINESS PROPERTIES GROUP, INC., a Utah Corporation, Defendant and Appellant.	**APPELLANT'S REPLY BRIEF** Case No. 970573-CA Priority 15

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court, Salt Lake County
Honorable Anne M. Stirba, District Judge (No. 960907623CN)

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Attorneys for Wallace Associates Business Properties Group

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ARGUMENT

In her brief Ms. Ekins makes several arguments which she claims invalidate her agreement to arbitrate this dispute. While the brief casts the arguments in several different ways, Ms. Ekins has raised the same issues raised before the trial court. Specifically, Ms. Ekins argues that the parties never agreed to arbitrate the instant dispute, that the agreement is unconscionable and that Wallace waived its right to arbitrate. For the reasons set forth below, Ms. Ekins' arguments lack merit.

I. THE PARTIES ARBITRATION AGREEMENT APPLIES TO THIS DISPUTE.

Ms. Ekins argues that the agreement to arbitrate is a narrow one that should be narrowly construed. Ms. Ekins cites *Docutel Olivetti Corp. v. Dick Brady Systems, Inc.*, 731 P.2d 475, 479 (Utah 1986), for the proposition that ambiguity in an arbitration clause should be construed against the drafter.

In *Docutel*, the parties entered into a contract that provided for litigation of claims arising under credit agreements between the parties. However, another paragraph of the contract provided that "all disputes arising under this Agreement or pertaining in any manner to the dealership created by this Agreement shall be resolved by Arbitration by an Appeal Board. . . ."

The trial court denied the defendant's motion to compel arbitration on the grounds that the dispute before the court involved a "credit agreement" and was not covered by the arbitration provision. The trial court held that the specific provision regarding credit agreements took precedence over the arbitration clause and that arbitration of all claims was not required.

On appeal, the Utah Supreme Court conceded that the contract was "not a model of clarity." *Id.* However, the court held that while ambiguities in an agreement are interpreted against the drafter, it is the policy of the Utah courts "to interpret arbitration clauses in a manner that favors arbitration." *Id.* The court further outlined the proper approach to construing the scope of arbitration clauses:

> 'Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. *If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration. . . .*'

Id. (emphasis added).

Ms. Ekins asks this Court to ignore Utah law and construe the scope of the arbitration provision narrowly. Ms. Ekins' arguments are not well taken when viewed in light of the undisputed facts. The arbitration agreement between Wallace and Ms. Ekins provides:

> In the event of any disagreement or dispute between Salesperson [Ms. Ekins] and other salesperson under contract with Broker which cannot be settled by and between the parties involved, such matter shall be decided by arbitration, and Broker and Salesperson agree to be bound by the terms and provisions of such decision.

In October, 1995, Ms. Ekins signed a termination agreement with Wallace. Appellant's Opening Brief, Exhibit "B." That agreement provides that commissions will be paid to Ms. Ekins for "transactions in process" only (also referred to as a pending transaction). The commission at issue in this case involves property located in the University of Utah's Research

Park ("Research Park"). Affidavit of David Jewkes, R.90 ¶¶ 5-6. Transactions regarding that property were listed on the termination agreement. Appellant's Opening Brief, Exhibit "B." The Termination Agreement also provides that it does not alter or change any provision of the Independent Contractor Agreement including the arbitration clause.

Three months after signing the Termination Agreement, on January 16, 1996, Ms. Ekins wrote a letter to Wallace inquiring about the status of the Research Park transaction. A copy of the letter is attached hereto as Exhibit "A." On the same day, the landlord of the property in question responded in a letter that the transaction proposed by Ms. Ekins and listed in the Termination Agreement did not come "to fruition" and all "future proposals would need to be negotiated from scratch." A copy of the letter is attached hereto as Exhibit "B." That letter indicated that all future negotiations regarding the Research Park property would involve Collin Perkins, a Wallace salesperson, rather than Ms. Ekins. Wallace sent a copy of this letter to Ms. Ekins on January 22, 1996. A copy of the letter is attached hereto as Exhibit "C." Ms. Ekins did not contact Wallace again regarding the Research Park transaction for over eight months after she had been informed that there was no pending transaction regarding Research Park.

Ms. Ekins' first argument is that because she has sued Wallace rather than Mr. Perkins, the arbitration provision does not apply. However, it is clear that Wallace paid the commission claimed by Ms Ekins to Mr. Perkins, another Wallace salesperson, in early

October 1996.[1] Affidavit of David Jewkes, R.91-92, ¶ 18. Mr. Perkins has asserted to Wallace that he is entitled to that commission and all future commissions arising out of the Research Park transaction. Affidavit of David Jewkes, R.92, ¶ 20.

Knowing that this evidence is fatal to Ms. Ekins' desire to litigate this dispute, Ms. Ekins has attempted to exclude any evidence regarding demand for payment by Mr. Perkins and payments to Mr. Perkins by Wallace. In the lower court, Ms. Ekins sought to strike portions of the Affidavit of Davis Jewkes as hearsay. Ms. Ekins has renewed that argument asking this Court to exclude inadmissible evidence in order to decide this appeal.

Ms. Ekins' hearsay argument misunderstands the hearsay rule. Rule 801(c) of the Utah Rules of Evidence provides that "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Utah Rules of Evidence 801(c). It is well-established that when an out-of-court statement is offered simply to prove that it was made, without regard to whether it is true, the statement is not proscribed by the hearsay rule. *State v. Sorenson*, 617 P.2d 333, 337 (Utah 1980); *State v. Hutchison,* 655 P.2d 635, 636 (Utah 1982). A statement that is offered for some purpose other than to prove its own truth is a "verbal act" and is not hearsay. *Durfey v. Board of Education*, 604 P.2d 480, 484-485 (Utah 1979).

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[1] While not necessary for the disposition of this appeal, Wallace can easily argue under the doctrine of subrogation that having paid the commission to Perkins, Wallace is entitled to stand in his shoes and assert his rights against Ms. Ekins. *See, e.g., State Farm Mut. Auto Ins. Co. v. Northwestern Natl. Ins. Co.*, 912 P.2d 983, 985 (Utah 1996) (defining subrogation as "'an equitable doctrine that allows a person or entity which pays the loss or satisfies the claim of another under a legally cognizable obligation or interest to step into the shoes of the other person and assert that person's right'" (citation omitted)).

In this case, the statements of Mr. Perkins are not offered to prove that he is entitled to the commissions in dispute. Rather, the statements are merely offered to prove that Mr. Perkins claims to be entitled to the commissions. As such, Mr. Perkins' statements are not offered for their truth and are not hearsay. Whether viewed in light of subrogation or Mr. Perkins' rights, it is clear that this is a dispute that falls within the intent of the arbitration provision.[2]

Ms. Ekins next argues that even if this is a dispute among salespersons, it is not a dispute among *current* salespersons and a dispute of current salespersons is required under the arbitration agreement. Ms. Ekins misconstrues the agreement. The relevant provision states that "any disagreement or dispute between Salesperson [Ms. Ekins] and other salesperson under contract with Broker" shall be governed by arbitration. Nothing in this provision requires Ms. Ekins to be a "current" Wallace salesperson.

Finally, Ms. Ekins argues that "she never received notice of any claim, demand, disagreement or dispute" that another Wallace salesperson asserted regarding the commissions at issue in this case. Brief of Appellee, P. 13. This argument misstates and ignores the facts. As stated above, Ms. Ekins has been on notice since January, 1996 regarding Mr. Perkins role in the Research Park transaction.

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[2] Viewing the Independent Contractor Agreement as a whole, it is clear that the intent of the arbitration provision is to prevent Wallace from having to pay a commission twice. This case involves exactly such a dispute.

Ms. Ekins semantic arguments that she has sued Wallace and has not sued another Wallace salesperson is without merit.[3] As noted above, any argument regarding the scope of an arbitration clause should be construed in favor of arbitration. This Court should therefore hold that the arbitration agreement applies to this dispute.

II. THE ARBITRATION AGREEMENT IS ENFORCEABLE.

Ms. Ekins further attempts to invalidate the Independent Contractor Agreement by arguing that it is unenforceable. Specifically, Ms. Ekins argues that the Agreement does not constitute a meeting of the minds, lacks mutuality and is unconscionable. A party seeking to have a contract set aside has the burden of proving that the contract in unenforceable. *Sosa v. Paulos,* 924 P.2d 357, 361 (Utah 1996).

A. THE PARTIES MUTUALLY ASSENTED TO THE AGREEMENT.

Ms. Ekins argues that her agreement to arbitrate is unenforceable because the agreement references the Salesperson's Policies and Procedures Manual. Ms. Ekins argues that because she was unaware of the Manual's contents, she is not bound by the agreement to arbitrate.

This argument overlooks the contractual principle that "parties may incorporate by reference into their contract the terms of some other document." 17A C.J.S. *Contracts* § 299 (1963). Indeed, as long as the reference to the extraneous document is clear and unequivocal in

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[3] Ms. Ekins also asserts that the trial court found that the arbitration agreement does not apply to this case. However, a review of the complete record reveals that the trial judge made no such finding. Indeed, at one point in its ruling the court stated that "the agreement clearly applies." Transcript of Proceedings 29: 10-14.

the contract, the document is incorporated into the contract. *Interwest Const. v. Palmer*, 886 P.2d 92, 97 n.8 (Utah Ct. App. 1994). Furthermore, the parties need not know the terms of the incorporated document as long as the terms are "easily available to the contracting parties." *Id.* *See also*, *Consolidated Realty Group v. Sizzling Platter Inc.*, 930 P.2d 268, 273 (Utah Ct. App. 1996).

Arbitration agreements frequently reference other documents rather than set forth all of the arbitration procedures in the contract itself. *See, e.g., Docutel Olivetti Corp. v. Dick Brady Systems, Inc.*, 731 P.2d 475, 476 (Utah 1986). A contract that references the arbitration rules of the American Arbitration Association or National Association of Securities Dealers does not render the arbitration provision unenforceable. *Id.*

In this case, Ms. Ekins has not established that the document referenced in the contract was unavailable. Ms. Ekins merely argues that she never read the incorporated rules and she is therefore not bound by them. Because she has failed to carry her burden of proving that the contract lacked mutual assent, Ms. Ekins should be bound by the agreement that she signed.

B. THE AGREEMENT DOES NOT LACK MUTUALITY.

Ms. Ekins next argues that the arbitration agreement is void because it lacks mutuality of obligation. This argument lacks merit.

Mutuality of obligation is an essential element of a contract. *Ross v. Producers Mut. Ins. Co.*, 295 P.2d 339, 344 (Utah 1956). However, "a plea that a contract is defective in

this regard is really a statement that the contract lacks consideration." *Id.* In cases where lack of mutuality is raised as a defense to a contract, the Utah Supreme Court has held that the issue to be determined "is whether, *considering the contract as a whole,* the [party was] left without valid consideration for [its] promise." *Id.* (emphasis added). Whenever possible, a contract should be so construed that there are mutually binding promises on each party. *Id.*

In *Allen v. Rose Park Pharmacy*, 237 P.2d 823 (Utah 1951), the Utah Supreme Court examined a contract not to compete filed by the former employer of a pharmacist. The pharmacist argued that the covenant not to compete was void because it lacked mutuality. In holding the contract valid, the court held that "a contract does not lack mutuality merely because its terms are harsh or its obligations unequal, or because every obligation of one party is not met by an equivalent counter obligation of the other party." *Id.* at 825 (quoting *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687, 688 (3rd Cir. 1924)).

Ms. Ekins argues that because the arbitration provision does not specifically require Wallace to arbitrate any dispute, the agreement lacks mutuality. However, under the Independent Contractor Agreement Wallace was required to pay Ms. Ekins commissions and to provide her with an office, equipment and real estate listings. Wallace performed its obligations under the Agreement for over six years. Ms. Ekins cannot contend that the Independent Contractor Agreement, considered as a whole, lacks mutuality.

C. THE AGREEMENT IS NOT UNCONSCIONABLE.

Ms. Ekins' final argument that the agreement is unenforceable is that its terms are unconscionable. Ms. Ekins contends that the provision requiring that the arbitrators be selected from among the salespersons working for Wallace lacks neutrality and renders the procedure unconscionable.[4]

In determining whether a contract is unconscionable, courts consider whether "its terms [are] so one-sided as to oppress or unfairly surprise an innocent party" or whether there exists "an overall imbalance in the obligations and rights imposed by the bargain." *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028, 1041 (Utah 1985) (quoting *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 462 (Utah 1983)).

In *Sosa v. Paulos*, 924 P.2d 357, 361 (Utah 1996), the Utah Supreme Court examined a challenge similar to that raised by Ms. Ekins. In *Sosa*, a patient agreed to submit any malpractice claim against her orthopedic surgeon to arbitration. The agreement required that arbitration panel consist of neutrally selected orthopedic surgeons. When the patient filed a lawsuit, the surgeon moved to stay the litigation proceedings and compel arbitration under the agreement. The trial court held the provision to be unconscionable and refused to stay the litigation.

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[4] The doctrine of unconscionability can be divided into two branches: procedural and substantive. Procedural unconscionability focuses on the formation of the agreement. Substantive unconscionability focuses on the agreement's contents. *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1041 (Utah 1985). Ms. Ekins does not raise any issue regarding the formation of the agreement but limits her argument to the agreement's substance.

On appeal, the Utah Supreme Court reversed the trial court. The court held that the patient had "not presented any evidence of likely bias-only assertion" and refused to find the provision unconscionable.

This case is analogous to *Sosa*. The fact that the arbitrators are to be selected from among the independent contractors who are former colleagues of Ms. Ekins does not render the proceeding biased. None of the potential arbitrators have a pecuniary interest in the outcome and this Court should require more of a showing of bias than Ms. Ekins' assertion.

Furthermore, even if this Court were to determine that the provision for selecting arbitrators is unconscionable, that does not render the Agreement unenforceable. In *Sosa*, the court held that an unconscionable provision does not render the entire agreement void. Rather, the Utah Supreme Court instructed the lower court to sever the unconscionable provision "and enforce the remainder of the agreement." *Id.* at 365. Accordingly, this Court should excise any unconscionable provision and compel the parties to arbitrate pursuant to their agreement.[5]

III. WALLACE DID NOT WAIVE ITS RIGHT TO ARBITRATE.

Ms. Ekins finally argues that Wallace waived its contractual right to arbitrate by failing to set forth in its Answer an affirmative defense that this dispute is subject to arbitration. However it is well-settled that a party's failure to refer to an arbitration provision in its answer does not waive its right to arbitrate. In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*,

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[5] Utah Code Ann. § 78-31a-5(2), (4) provides: "If no procedure [for appointment of arbitrators] is specified, or if the agreed method fails or cannot be followed for any reason, or if an arbitrator fails or is unable to act, any party to the arbitration agreement may move the court to appoint one or more arbitrators, as necessary. . . . Upon this motion, the court shall appoint the necessary arbitrators, whom the court shall find qualified to arbitrate the issues stated in the motion.

460 U.S. 1, 24-25 (1983), the United States Supreme Court examined the Federal Arbitration Act and held that any doubts concerning arbitrable issues "should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

In *American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88 (4th Cir. 1996), the Fourth Circuit examined a case where the party seeking to compel arbitration did not raise arbitration as a defense in its answer. The court held that because of the strong federal policy favoring arbitration, courts "will not lightly infer the circumstances constituting waiver" and the party opposing arbitration "bears the heavy burden of proving waiver." *Id.* at 95. (quoting *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)). The court held that failure to raise arbitration as an affirmative defense does not constitute waiver. *Id.* at 96. *See also, Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 982-983 (4th Cir. 1985) (holding that failure to raise arbitration provision as affirmative defense did not waive right to arbitrate).

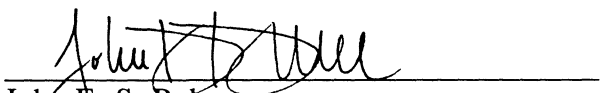
Utah shares the federal policy favoring arbitration. The Utah Supreme Court has consistently recognized "the strong public policy in favor of arbitration 'as an approved, practical and inexpensive means of settling disputes and easing court congestion.'" *Chandler v. Blue Cross Blue Shield of Utah*, 833 P.2d 356, 358 (Utah 1992) (quoting *Robinson & Wells, P.C. v. Warren*, 669 P.2d 844, 846 (Utah 1983)). Given the public policy in favor of arbitration, this Court should hold that the mere failure to raise arbitration as an affirmative defense does not constitute waiver.

Furthermore, Ms. Ekins has suffered no prejudice as required by *Chandler*. Ms. Ekins alleged prejudice consists of *receiving* documents from Wallace and subpoenaing documents from a third party. All such documents will be as admissible in arbitration as they would be in formal litigation. Ms. Ekins also attempts to manufacture additional prejudice by citing the attorney's fees that she spent in filing a complaint and researching the case. Again, such preparation is not unique to litigation and simply does not amount to the prejudice required under *Chandler*. Because Wallace has not caused undue delay and Ms. Ekins has suffered no prejudice, Wallace has not waived its right to arbitrate.

CONCLUSION

Wallace and Ms. Ekins entered into an enforceable arbitration agreement that governs the dispute before this Court. Wallace has at no time waived that contractual right. Wallace therefore respectfully asks this Court to reverse the trial court's ruling and enter an order compelling the parties to arbitrate their dispute.

DATED this 20 day of April, 1998



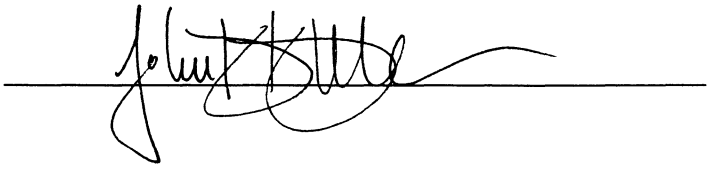
John E. S. Robson
John D. Dunn
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Plaintiff

/jdd/130672

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of April, 1998, I caused to be hand delivered two true and correct copies of foregoing APPELLANT'S REPLY BRIEF, to:

James C. Swindler, Esq.
Johnson & Hatch
Suite 400
10 West Broadway
Salt Lake City, Utah 84111



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Tab A

BPG

Business Properties
GROUP L.C.

January 16, 1996 **Certified Mail**

Mr. David Jewkes
Wallace Associates Business Properties Group
165 South Main
Suite 500
Salt Lake City, UT 84108

RE: 410 CHIPETA WAY, SALT LAKE CITY, UTAH
LEASE AGREEMENT WITH UNIVERSITY OF UTAH

Dear David:

This letter serves to confirm our conversation on January 9, 1996 regarding the consolidation of eight (8) separate lease agreements for the University of Utah at 410 Chipeta Way. Below, please find an outline of the existing lease agreements in question and the terms of the new lease agreement which is presently out for the Tenant's signature.

UNIVERSITY OF UTAH LEASE AGREEMENT (EXISTING):

410 CHIPETA WAY SUITE #	U OF U DEPARTMENT	RENTABLE SQ.FT. 1ST LEVEL	RENTABLE SQ. FT. 2ND LEVEL	EXPIRATION DATE
100	U of U Cardiovascular #1	3,494		12/31/00
156	U of U Coll. Of Medicine (Physiology)	24,855		4/24/97
	Poison Control		13,184	4/24/97
211	U of U Lung Health		1,322	7/31/96
213	U Med. Ctr Orthopedic Billing		2,845	8/31/98
215	U of U Cardiovascular #2		1,580	3/31/97
219	U of U SSRD/STACC		3,615	9/30/00
222	U of U Physiology-Storage		1,615	1/31/97
S-1		536		4/24/97
TOTALS		28,885	24,161	

One Utah Center
201 South Main Suite 1050
Salt Lake City, Utah 84111-4904
Office 801-355-2000
Fax 801-355-8166

NEW LEASE TERMS:

Base Rental Rate:	$8.55 per rentable square foot, per annum, on a triple net lease basis. The above represents a blended lease rate for the first and second levels——See Schedule 1 attached.
Lease Term:	Ten (10) years.
Base Rental Increase:	The Base Rental Rate as set forth above is subject to an increase at the expiration of the twelfth (12th) calendar month after the Lease Term commences, and on the expiration of each 12th calendar month thereafter. The base for computing the increase is the Consumer Price Index for all urban consumers (1984 = 100) with a minimum increase of three and one-half percent (3.5%) and a maximum increase of eight percent (8%).
Operating Expenses:	In addition to the Base Rental Rate, Tenant shall be responsible for its proportionate share of the Operating Expenses for the Building, which includes but is not limited to, utilities, property taxes, building insurance, and repairs and maintenance. Tenant's proportionate share is approximately 91.89%.

Please note, the above Base Rental Rate represents an increase of approximately 60% greater than the old rental rate. This 60% increase also does not reflect the increase in revenues from an early renewal, as well as, the annual base rental increases. Also, there were no tenant concessions or tenant refurbishment allowances to be paid by BGK.

The above lease terms, as also defined in the Lease Agreement out for signature, was only approved by BGK after a comprehensive analysis of each of the eight (8) lease agreements, and a thorough research and analysis of market lease comparables. Patricia Martin (Cheryl Willoughby's predecessor) and Ed Gilbert, both reviewed these terms, and had a complete understanding of reasons this transaction would be very profitable for BGK, and were motivated to bring the lease to execution.

It is my understanding through your verbal communication, that BGK does not intend to complete this transaction, and has informed Wallace Associates to terminate the negotiations.

Accordingly, I consider myself released from my obligation to represent BGK's interest without however, compromising my commission position in the event negotiations continue. Please let me know within five (5) business days if your understanding or their intentions are to the contrary.

Sincerely,

Debra A. Ekins

Debra A. Ekins, CCIM
Office Properties

DAE/ps

enclosures

DEBRA\CHIPETA.LTR

SCHEDULE 1

LEASE PROPOSAL
UNIVERSITY OF UTAH
410 CHIPETA WAY
August 8, 1994

JITE #	TENANT	RENTABLE SQ. FT. 1ST LEVEL	RENTABL SQ. FT. 2ND LEVE	CURRENT COMMENCEMEN DATE	CURRENT EXPIRATION DATE	PROPOSED COMMENCEMEN DATE	PROPOSED EXPIRATION DATE	RENTAL RATE PER SQ. FT.	BASE MONTHLY RENTAL
100	U of U Cardiovascular #1	3,494		01/01/93	12/31/95	01/01/96	03/31/2007	$6.50	$1,892.58
156	U of U Coll. of Medicine (Physiolo	24,855		05/01/77	04/24/97	04/25/97	03/31/2007	$6.50	$13,463.13
	U of U Coll. of Medicine (Physiology)		13,184	05/01/77	04/27/94	04/25/97	03/31/2007	$11.00	$12,085.33
211	Poison Control		1,322	08/01/93	07/31/96	08/01/96	03/31/2007	$11.00	$1,211.83
213	U of U Lung Health		2,845	09/01/93	08/31/98	09/01/98	03/31/2007	$11.00	$2,607.92
215	U Med. Center Orthopedic Billing		1,580	04/17/92	03/31/95	04/01/95	03/31/2007	$11.00	$1,448.33
219	U of U Cardiovascular #2		3,615	09/25/92	09/24/95	09/25/95	03/31/2007	$11.00	$3,313.75
222	U of U SSRD/STACC		1,615	02/08/93	01/31/97	02/01/97	03/31/2007	$11.00	$1,480.42
222	U of U Physiology-Storage	536		04/01/93	04/24/97	04/25/97	03/31/2007	$6.50	$290.33
TALS		28,885	24,161						$37,793.52

Tab B

BGK
REALTY INC
330 Garfield Street # 200 Santa Fe, NM 87501
(505) 982-2184 FAX (505) 982-2515

January 16, 1996

Mr. Glenn Warnick
University of Utah
School of Medicine
50 N. Medical Drive
Salt Lake City, UT 84132

Re: 410 & 420 Chipeta Way

Dear Mr. Warnick:

I represent Research Park Associates who is the owner/landlord of the above referenced buildings. It has come to my attention that there may possibly be some confusion with respect to the various University of Utah leases located at these buildings and I wanted to clear up any misunderstandings.

Last March, as you will probably recall, there was a lease proposal to consolidate all of the University of Utah leases into one masterlease. This offer expired April 28, 1995. There was still some effort to do something shortly after this deadline but nothing came to fruition. In addition the Cardiovascular #1 and #2 leases which were to be part of the original consolidation were renewed individually. Because of the expiration of the original proposal and the extreme time delay we consider any proposals void or terminated with regards to consolidating the leases. Any future proposals would need to be negotiated from scratch.

The agent at the time who worked on these proposals was Debra Ekins who is now no longer with Wallace Associates and who no longer is our representative in any lease matters. Our authorized leasing agent with Wallace Associates is Collin Perkins and our authorized managing agent is Renee Schmid.

In addition, there has been some recent communication regarding where a lease amendment for Homeskilled Long Term of the University of Utah is. I am afraid I am perplexed by this as we have never agreed to a lease renewal for this entity and have never seen any proposed rates, etc. in connection with this. This is not to imply that we do not have a desire to renew the lease, only that we have never had any discussions regarding this. If this is something which was discussed between you and Ms. Ekins, it should not be construed as a pending transaction as it was never discussed with our office.

Our authorized agent, Collin Perkins of Wallace Associates will be contacting you in the near future about your lease renewals. I sincerely apologize for any confusion that occurred during and after Debra Ekins' transition from Wallace Associates. I hope you understand that because of her prior fiduciary responsibility as our agent, it would be unethical for her to remain involved in any future transaction with any existing tenant at these properties unless of course you desire to retain her and pay her directly as your Tenant representative.

We appreciate the University of Utah as a tenant and we look forward to a long term relationship with the University. Should you have any questions please do not hesitate to call either Collin Perkins or Renee Schmid of Wallace Associates or myself directly.

Sincerely,

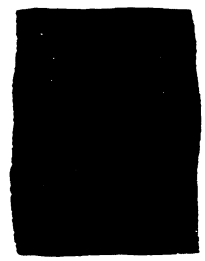
Cheryl S. Willoughby, CCIM
Senior Vice President

/csw

... cc: Renee Schmid
Collin Perkins

Tab C

WALLACE
ASSOCIATE



January 22, 1996

Ms. Debra Ekins, CCIM
Business Properties Group, L.C.
201 South Main Street, Suite 1050
Salt Lake City, Utah 84111-4904

Re: 410 Chipeta/University of Utah

Dear Debra,

I am in receipt of your letter dated January 16, 1996.

I am forwarding, with this letter, a copy of a letter from BGK, received after our inquiry regarding the status of the subject negotiations.

After my review of the attached letter from the client, I have concluded that there is not a pending transaction with BGK and the University of Utah.

Respectfully,

David L. Jewkes
Wallace Associates Business
Properties Group

encl.

cc: Cheryl S. Willoughby, CCIM

DLJ/kds